Supreme Court, U.S.
FILED

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No. ____

IN THE

Supreme Court of the United States

ROSEMARY JOHNSON-KUREK,

Petitioner,

-v-

SAMIR ABU-ABSI,
THOMAS BARDEN,
AND CAROL NELSON-BURNS
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Sixth Circuit Court of Appeals, in claims brought by a nontenured lecturer at a university pursuant to 42 U.S.C. §§ 1983 alleging that her First Amendment rights to free speech and academic freedom were violated, correctly upheld the District Court's finding that Plaintiff's rights were not implicated or violated when a tenured faculty member attempted to require her to make specific communications to her students, when those communications would have contained specific content which was inconsistent with Plaintiff's professional judgment and which would have interfered in her teaching of the students.

PARTIES TO THE PROCEEDING

Petitioner is Rosemary Johnson-Kurek . She was Plaintiff in the District Court and Appellant in the Court of Appeals.

Respondents are Samir Abu-Absi, Thomas Barden, and Carol Nelson-Burns, in their personal capacities. They were Defendants in the District Court and Appellees in the Court of Appeals.

There are no corporate respondents.

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STATUTES

U. S. Constitution, Amendment 1 5,6,8-10, 18,20

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 423 F.3d 590.

The opinion of the District Court (App. B) is unreported.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

The Eleventh Amendment to the United States Constitution provides as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case involves a balance of rights of academic freedom among a nontenured university lecturer, the University, and the lecturer's students.

Petitioner is a non-tenured lecturer in the University of Toledo's Department of English Language and Literature and the Department of Theater and Film. At all times relevant hereto, Respondent Abu-Absi was the chair of the English Department, Respondent Barden served as the Associate Dean for Humanities in the University's College of Arts and Sciences, and Respondent Nelson-Burns served as the English Department's Curriculum Director of Report Writing.

Petitioner has worked as a full- or part-time lecturer at the University since 1990. During the fall 2000 semester, Petitioner taught an organizational report writing class for the English Department. An important assessment tool for the class was a report which had to be turned in at the end of the academic term. Some of the students turned in their reports without proper citation, in some cases amounting to outright plagiarism. Because many of the affected students were exchange students whose prerequisite writing skills were lacking in comparison to other students, and for whom this was their first college-level writing course, Petitioner issued grades of "incomplete" to the affected students, to permit them opportunity to correct their work. Petitioner e-mailed those students informing them why they had been issued "incompletes" and informing them generally but purposefully of their errors.

After issuing the grades, Petitioner met with Respondent Nelson-Burns. Petitioner explained the steps she had taken and gave Nelson-Burns a copy of the e-mail she had sent to the students.

In response, Nelson-Burns demanded that Petitioner write individual letters to the affected students explaining to each student specifically what was required in their particular

case. (Apx. Pg. 12). In a memorandum sent by Nelson-Burns to Petitioner concerning the letters, Nelson-Burns stated that Petitioner should send a draft of each letter to Nelson-Burns before Petitioner sent them to the students. (Apx. Pg. 12). Specifically, and in relevant part, Nelson-Burns' memo to Petitioner made the following demand:

> As we discussed, a more specific statement needs to be prepared for ***each*** student and ***each*** student needs to be told specifically what he or she must do to finish the coursework and earn a grade. Please note that although your instructions in those published messages may seem clear, a given student may still be confused as to what is expected of him or her personally. Please draft those statements and share them with me before forwarding them to students.
>
> (emphasis in original).

Writing the individualized letters to the students would have interfered with Petitioner's assessment of the students' learning. (Apx. Pg. 12). Because the very purpose of the report was to assess what the students had learned over the academic term, detailing to the students how to correct their errors would have undermined the purpose of assigning the report and would have in effect forced Petitioner to do for the students what the students were to demonstrate they could do for themselves. Furthermore, since the students' grades were dependent in part upon their ability to write the report, hand-feeding them the solutions to their mistakes would have resulted in a report grade, and hence a final grade, not actually reflective of the students' work.

Since 1990, Petitioner with only one exception had been given two courses to teach each academic period, which

is the standard assignment for part-time teachers in English Department. However, on or about August 20, 2001, Petitioner was verbally informed that she had been given a less than standard assignment for Fall, 2001, for the purported reason that she was uncooperative and for other alleged reasons, all of which were false or were capricious and arbitrary. (Apx. Pg. 13). When the matter was brought to the attention of Respondent Abu-Absi, Chair of the Department of English, Abu-Absi refused to hear and attempt to resolve her grievance. (Apx. Pg. 14). When Petitioner approached Respondent Barden for assistance in filing a grievance in accord with the Bylaws and General Rules of the University, he told her that she was not permitted to do so. (Apx. Pg. 14).

On August 27, 2003, Petitioner filed a Complaint against Respondents, in both their official and their individual capacities, which alleged violations of Petitioner's rights of free speech and academic freedom under the First Amendment, and violations of her due process rights under the Fourteenth Amendment. Respondents timely filed an answer, and on April 13, 2004, a Motion to Dismiss or Alternatively for Judgment on the Pleadings was filed by all Respondents. In this motion Respondents contended that they had absolute 11th amendment immunity for acts committed in their official capacities and that they had qualified immunity for acts committed in their individual capacities. The 11th amendment immunity assertedly arose from the fact that Respondents all acted within the scope of their employment, and that because the university was an arm of the state, and therefore immune from suit, employees acting within the scope of their employment were *ipso facto* immune from suit. Qualified immunity for acts committed in their individual capacities assertedly existed because the challenged speech in which Petitioner refused to engage, namely, specifically informing each student exactly how to

correct each error in their reports, did not implicate the First Amendment.

Respondents also argued that, for the same reasons, even if they were not immune from Petitioner's claims, they were entitled to judgment on the pleadings in that, according to Respondents, Petitioner could state no set of facts that would entitle her to relief. Additionally, Respondents contended that Petitioner had failed to plead that Respondents acted under color of state law, and also that her claims were barred by the applicable statute of limitations.

In response, Petitioner argued that the 11th amendment did not bar injunctive relief against state officials in their official capacities for non-monetary relief, which was included within the claim. Petitioner, citing ***Parate v. Isibor***, 868 F.2d 821 (6th Cir.1989), also argued that Respondents were not immune from liability for their acts, and that Petitioner had stated a claim that would entitle her to relief, because, while the university enjoyed great latitude in pursuing its ends without interference from the government, and while faculty remained subject to reasonable supervision, faculty members enjoyed freedom to assign grades and evaluate students according to their own professional judgment, and that the First Amendment protected faculty members from being compelled to communicate specific speech to students against the professor's professional judgment.

Petitioner also argued that she had implicitly pled color of state law, and that her claims were not barred by the statute of limitations, since the injury alleged in the case, failure to provide Petitioner with a second class to teach, occurred within the limitations period.

After appropriate briefing, the District Court dismissed Johnson-Kurek's claims against all three Respondents for lack of subject matter jurisdiction, on Eleventh Amendment and qualified immunity grounds; for failure to state a claim; and, in the case of her claims against